Supreme Court, U.S.
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No. 90-1088

In The

Supreme Court of the United States

October Term, 1990

EVA O. RETTIG,

Cross-Petitioner,

v.

THE KENT CITY SCHOOL DISTRICT, et al.,

Respondents.

Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the cross-petition was properly and timely filed.

2. Whether the parent of a handicapped child who has not prevailed on any issue in this action is entitled to relief from this Court.

LIST OF ALL PARTIES

Petitioner:	Thomas M. Rettig
Cross-Petitioner:	Eva O. Rettig
Respondents:	Kent City School District Donna G. Lightel (in her official capacity as Superintendent) Michael J. Chrin (in his official capacity as Director of Child Study and Special Education) Board of Education of the State of Ohio Dr. Franklin B. Walter (in his official capacity as State Superintendent)

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OPINIONS AND JUDGMENTS BELOW

The decision of the Court of Appeals for the Sixth Circuit filed on August 29, 1990, is not officially reported. The Memorandum and Order of the United States District Court for the Northern District of Ohio, Eastern Division, filed on July 28, 1989, also is not officially reported.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was filed on August 29, 1990. The cross-petition for a writ of certiorari was filed on January 7, 1991. The cross-petition was not properly or timely filed, and this Court does not have jurisdiction.

STATEMENT OF THE CASE

The case *sub judice* is the third in a series of cases initiated by Eva O. Rettig (hereinafter referred to as "the Cross-Petitioner") on behalf of her son, Thomas M. Rettig, pursuant to the provisions of the Education for All Handicapped Children Act of 1975 (hereinafter referred to as "the EAHCA"), 20 U.S.C. §1400 *et seq.* The Cross-Petitioner originally requested an impartial due process hearing on March 1, 1978, respecting the individualized education program (IEP) developed for Thomas during the 1978-1979 school year. On April 30, 1979, the impartial hearing officer issued a comprehensive opinion, which concluded that the Respondent, Kent City School District, was providing Thomas with a free appropriate

public education as required by the EAHCA. The State Board of Education affirmed the impartial hearing officer's decision.

Thereafter, the Cross-Petitioner initiated an action in the United States District Court for the Northern District of Ohio, Eastern Division, on November 30, 1979. The amended complaint filed in this action contained ten (10) causes of action related to Thomas' IEP for the 1978-1979 school year and raised claims relating to the years 1970 to 1978. The District Court rendered its final order on August 25, 1981. The District Court affirmed the impartial hearing officer's decision and found in favor of the Respondents on all but two (2) issues. The State Board of Education was ordered to amend an administrative rule to be consistent with the EAHCA, and the Kent City School District was ordered to incorporate one (1) hour of extracurricular activities each week into Thomas' 1981-1982 IEP. This decision of the District Court is officially reported as *Rettig v. Kent City School District*, 539 F.Supp. 768 (N.D. Ohio 1981).

The Cross-Petitioner appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit, and the Kent City School District filed a cross-appeal. The Court of Appeals vacated that portion of the District Court's decision mandating the inclusion of one (1) hour of extracurricular activities per week in the future IEP developed for Thomas and remanded this issue to the District Court for further consideration in light of the intervening decision of this Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). In all other respects, the Court of Appeals affirmed the

District Court's judgment. This decision of the Court of Appeals is officially reported as *Rettig v. Kent City School District*, 720 F.2d 463 (6th Cir. 1983).

The decision of the Court of Appeals was appealed by the Cross-Petitioner to this Court, and on May 21, 1984, this Court entered its order dismissing the appeal or in the alternative denying the petition for a writ of certiorari. *Rettig v. Kent City School District*, 467 U.S. 1201, 104 S.Ct. 2379, 81 L.Ed.2d 339 (1984). This Court also denied the Cross-Petitioner's application for rehearing on June 18, 1984. *Rettig v. Kent City School District*, 467 U.S. 1257, 104 S.Ct. 3549, 82 L.Ed.2d 852 (1984).

Upon remand, the District Court affirmed its earlier decision respecting the provision of extracurricular activities. The Kent City School District appealed, and the Cross-Petitioner cross-appealed. On March 10, 1986, the Court of Appeals issued its decision, which reversed the judgment of the District Court and dismissed the Cross-Petitioner's cross-appeal, because it raised issues "that were fully litigated in the 1981 district court proceedings and have been previously resolved on appeal to this court and the United States Supreme Court." *Rettig v. Kent City School District*, 788 F.2d 328, 332 (6th Cir. 1986). The decision of the Court of Appeals was appealed by the Cross-Petitioner, and on June 30, 1986, this Court entered its order denying the petition for a writ of certiorari. *Rettig v. Kent City School District*, 478 U.S. 1005, 106 S.Ct. 3297, 92 L.Ed.2d 711 (1986).

Meanwhile, on September 29, 1982, the Cross-Petitioner requested a second impartial due process hearing. On December 16, 1982, the impartial hearing officer

issued her order dismissing the Cross-Petitioner's request, because she failed to specify the issues to be considered as required by the Ohio Administrative Code. This decision was affirmed by the State Board of Education after conducting a state level review.

Thereafter, the Cross-Petitioner commenced an action in the United States District Court for the Northern District of Ohio, Eastern Division, on July 15, 1983. The Respondents moved to dismiss this action on the grounds of *res judicata*, failure to exhaust administrative remedies, and failure to state a claim. Initially, these motions were denied by the Court; however, they were later renewed by the Respondents. On October 23, 1986, the Court dismissed the action after giving the Cross-Petitioner an opportunity to further amend the complaint to state a cause of action for the 1986-1987 school year. *Rettig v. Kent City School District*, Case No. C83-2881 (N.D. Ohio 1986, unreported).

Less than two (2) months later, on December 12, 1986, the Cross-Petitioner filed a request for a third impartial due process hearing. On January 30, 1987, the impartial hearing officer issued his decision in which it was concluded that the issues raised in the request were either not appropriate for a due process hearing or were already addressed in previous litigation between the parties. As a result, the impartial hearing officer sustained the Respondent school district's motion to dismiss. This decision was affirmed by the state level review officer in a decision rendered on April 6, 1987.

More than eight (8) months later, on December 31, 1987, the Cross-Petitioner commenced the present action

in the United States District Court for the Northern District of Ohio, Eastern Division. This latest complaint named as defendants the Kent City School District; Donna G. Lightel, Superintendent of the Kent City School District; and Michael J. Chrin, Director of Child Study and Special Education for the Kent City School District (hereinafter referred to as "the Local Respondents"). Also named as defendants were the State Board of Education and Franklin B. Walter, State Superintendent of Public Instruction (hereinafter referred to as "the State Respondents"). On January 25 and 26, 1988, the Local Respondents and the State Respondents, respectively, filed separate motions to dismiss predicated upon the grounds that the causes of action contained in the complaint were barred by the doctrine of *res judicata*; that the causes of action were barred by the applicable statute of limitations; that the Cross-Petitioner failed to exhaust mandatory administrative remedies; that the action was moot; that the complaint failed to state a claim upon which relief could be granted; and that the claims against the State Respondents were barred by the Eleventh Amendment and the doctrine of sovereign immunity. On July 28, 1989, the District Court filed its Memorandum and Order in which the Respondents' motions to dismiss were granted.

The Cross-Petitioner appealed the decision of the District Court to the United States Court of Appeals for the Sixth Circuit on September 20, 1989. Thereafter, on August 29, 1990, the Court of Appeals issued its decision, which affirmed the orders of the District Court dismissing the action and denying a new trial. The Court of

Appeals indicated its agreement with the reasoning articulated by the District Court and, further, concluded that the case is moot, since Thomas, by virtue of his age, is no longer entitled to the protections and benefits of the EAHCA.

Thereafter, on November 27, 1990, a petition for a writ of certiorari was filed in this Court on behalf of Thomas M. Rettig and assigned case number 90-6388. The present cross-petition was filed in this Court by Eva O. Rettig on January 7, 1991, and assigned case number 90-1088. The Respondents were granted an extension of time through and including February 22, 1991, in which to file a response to the cross-petition.

SUMMARY OF ARGUMENT

The cross-petition has not been properly or timely filed in accordance with Sup. Ct. R. 12 and Sup. Ct. R. 13. Moreover, the contents of the cross-petition have no relevance to the issues addressed by the Court of Appeals. Finally, the District Court correctly determined that the Cross-Petitioner's action is barred by the doctrine of *res judicata*, and the Court of Appeals correctly held that it is moot.

ARGUMENT

Sup. Ct. R. 13 reads, in pertinent part, as follows:

> .1. A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, a United States

court of appeals, or the United States Court of Military Appeals shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed with the Clerk within 90 days after the entry of the order denying discretionary review.

.2. A Justice of this Court, for good cause shown, may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days.

.3. The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4. The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

.5. *A cross-petition for a writ of certiorari shall be deemed in time when it is filed with the Clerk as provided in paragraphs .1, .2, and .4 of this Rule, or in Rule* 12.3. However, a cross-petition which, except for Rule 12.3, would be untimely, will not

be granted unless a timely petition for a writ of certiorari of another party to the case is granted.

* * *

(emphasis added)

In addition, Sup. Ct. R. 12 reads, in pertinent part, as follows:

* * *

.3. *Not more than 30 days after receipt of the petition for a writ of certiorari, counsel for a respondent wishing to file a cross-petition that would otherwise be untimely shall file, with proof of service as prescribed by Rule 29, 40 printed copies of a cross-petition for a writ of certiorari,* which shall comply in all respects with Rule 14, except that materials printed in the appendix to the original petition need not be reprinted, and shall pay the docket fee pursuant to Rule 38. The cover of the petition shall clearly indicate that it is a cross-petition. The cross-petition will then be placed on the docket, subject, however, to the provisions of Rule 13.5. It shall be the duty of counsel for the cross-petitioner to notify the cross-respondent, on a form supplied by the clerk, of the date of docketing and of the docket number of the cross-petition. The notice shall be served as required by Rule 29. A cross-petition for a writ of certiorari may not be joined with any other pleading, and the Clerk shall not accept any pleading so joined. The time for filing a cross-petition may not be extended.

.4. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner notifies the Clerk of this court in writing of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of the notice shall be served as required by Rule 29 on all parties to the

> proceeding below. A party noted as no longer interested may remain a party by promptly notifying the Clerk, with service on the other parties, of an intention to remain a party. *All parties other than petitioners shall be respondents, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner,* except that a response to the petition shall be filed within 20 days after its receipt, and the time may not be extended.
>
> * * *
>
> (emphasis added)

In the case *sub judice,* the Cross-Petitioner states that "[s]he has been a party-plaintiff since 1978 and in This Court joins Petitioner * * * ." (Cross-Petition at p. 14). In fact, in all previous litigation between these parties, the Cross-Petitioner has been a party and a *pro se* advocate on behalf of herself and her son. The Cross-Petitioner's attempt, at this stage of the proceedings, to somehow separate herself from her autistic and mentally retarded son is a gross misrepresentation of the true state of affairs.

It is apparent that the Cross-Petitioner is truly not a "respondent" in this matter and, thus, does not have the right to file a cross-petition as contemplated by Sup. Ct. R. 12.3. Furthermore, even if one assumes *arguendo* that the Cross-Petitioner is a "respondent" in this matter, it is clear that she supports the petitioner, and, thus, her cross-petition should have been filed at the time that the original petition was filed as contemplated by Sup. Ct. R. 12.4 and Sup. Ct. R. 13.5. Consequently, it is respectfully submitted that the cross-petition was not properly or timely filed in this Court and should be dismissed.

The Respondents' second objection to the cross-petition is the fact that the whole petition is irrelevant in that it has no application to the present case. The entirety of the cross-petition ostensibly addresses the question of the relief to which a parent of a handicapped child, who is a prevailing party in an action brought under the EAHCA, is entitled. However, the fact of the matter is that the Cross-Petitioner has not prevailed in this matter or in any of the other administrative or legal proceedings that she has initiated. The case now before this Court was dismissed by the District Court pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, and this dismissal was affirmed by the Court of Appeals.

The District Court dismissed the Cross-Petitioner's action on the grounds of *res judicata* and failure to exhaust administrative remedies. In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), this Court stated that "[u]nder res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." 449 U.S. at 94, 101 S.Ct. at 414, 66 L.Ed.2d at 313. Moreover, in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), this Court stated:

> This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 518, 75 L.Ed. 1224 (1931). We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a

> more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . " *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917).
>
> 452 U.S. at 401, 101 S.Ct. at 2429, 69 L.Ed.2d at 110-111.
>
> (emphasis in original)

The Respondents have been involved almost continuously in administrative and legal proceedings concerning Thomas Rettig for a period of approximately thirteen (13) years, and have expended thousands of dollars in defending themselves against the Cross-Petitioner's repeated attempts to relitigate her claims. Previously, this Court declined to grant certiorari in an earlier case involving the same parties and the same issues, which the Petitioner and Cross-Petitioner are again seeking to present. In light of today's crowded dockets and the significant public interests served by the doctrine of *res judicata*, the District Court was correct in putting an end to this matter by dismissing the Cross-Petitioner's Complaint. The Court of Appeals affirmed the District Court's decision and also determined that this case is moot under this Court's decision in *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). It is respectfully submitted that this Court should not disturb the decision of either of the lower courts.

CONCLUSION

Based upon the foregoing, as well as the Brief in Opposition to the original petition filed on January 2, 1991, the contents of which are incorporated herein by reference, the Respondents respectfully urge this Court to deny both the petition for a writ of certiorari docketed as case number 90-6388 and the cross-petition for a writ of certiorari docketed as case number 90-1088.

Respectfully submitted,

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